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MAXWELL STARSKY

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, **v.** **MAXWELL STARSKY, ET. AL,** Defendants.	Case No. 15-CR-0234 (CRB)(JSC) **DEFENDANT MAXWELL STARSKY'S NOTICE OF MOTION AND MOTION TO TRANSFER HIM FROM TRIAL GROUP ONE TO TRIAL GROUP TWO, TO SEVER HIS TRIAL FROM THAT OF CO-DEFENDANTS AND FOR RELIEF FROM PREJUDICIAL JOINDER; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

TO: CLERK OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA; BRIAN STRETCH, ACTING UNITED STATES ATTORNEY, ASSISTANT UNITED STATES ATTORNEYS:

PLEASE TAKE NOTICE THAT on February 8, 2017, at 2:00 p.m., in the Courtroom of the Honorable Charles Breyer, Defendant Starsky will and hereby does move the Court for orders: (1) removing him from Trial Group One and placing him in trial Group Two; (2) severing his trial from the trials of other defendants who are charged with offenses with which he has no demonstrable connection; and (3) affording him relief from prejudicial joinder.

This motion is based on prior orders of the Court regarding grouping of defendants for trial, the Due Process Clause of the Fifth Amendment, and Rule 8 of the Federal Rules of Criminal Procedure, pertaining to joinder of offenses and defendants, and Rule 14(a) of the Federal Rules of Criminal Procedure, which affords relief from prejudicial joinder.

Date: December 15, 2016 Respectfully submitted,

/s/ William L. Osterhoudt
WILLIAM L .OSTERHOUDT,
Attorney for Defendant Starsky

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

On February 11, 2016, the government filed a 23-count Second Superseding Indictment, charging thirty-eight people with a loose variety of crimes.[1] The government has attempted to corral these disparate defendants and allegations into three groups for purposes of proceeding to trial. According to the government "the three trial groups suggested by government counsel make the most sense from an evidentiary perspective" in that "the government tried to best reflect the primary scheme in which the defendants were involved." (Dkt. #715, 3:16-17, 20-21). At a hearing on September 14, 2016, the government presented its proposed groups, designating the alleged "Financial Crimes Group (money laundering, identity theft and bank/wire fraud)" as Trial Group 1, and included defendant Starsky in that Trial Group.[2] Various defendants voiced objections to their inclusion in various groups and the Court directed any defendant who objects to his inclusion in a group file those objections for consideration at a hearing scheduled for October 26, 2016. Mr. Starsky strongly objects to his inclusion in Group 1 - the "Financial Crimes" Group. While he is charged with various "financial crimes," he alone among the defendants in Group 1 is primarily involved, according to the Indictment and discovery, in the pharmaceuticals "Drug Diversion Group" designated as Group 2. An examination of the charges makes clear that all of the so-called financial offenses with which he is charged actually grow out of and are inextricably bound up with his alleged involvement in the pharmaceuticals transactions. Thus, when judged under the criteria propounded by the government as the basis for the groupings, Mr. Starsky should be included in Group 2 rather than Group 1.

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[1] Thereafter, four of the defendants were dismissed from the case on motion of the government.

[2] Also included in this Group are defendants Gevork Ter-Mkrchyan, Artin Sarkissians, Dmitry Kustov, Loui Artin, Michael Inman, Hripsime Khachtryan, Ararat Yesayan, Tigran Sarkisyan, and Ara Karapedyan. (Joint Memorandum re Trial Groupings and Trial Setting – Docket #715, p. 2:11-15.)

Mr. Starsky's inclusion in this Group also runs counter to Rules 8 and 14 of the Federal Rules of Criminal Procedure, which govern joinder of defendants and offenses, and prejudicial joinder requiring severance.

ARGUMENT

I. Background - Allegations Against Maxwell Starsky

Defendant Maxwell Starsky is charged in this indictment with racketeering conspiracy (18 U.S.C. § 1962(d))(Count One), conspiracy to commit identity theft (18 U.S.C. § 1028(f))(Count Two), conspiracy to commit access device fraud (18 U.S.C. § 1029(b)(2))(Count Three), conspiracy to commit mail, wire or bank fraud (18 U.S.C. §1349)(Count Four), money laundering (18 U.S.C. § 1956(h)(Count Five), and conspiracy to engage in unlicensed wholesale distribution of drugs (18 U.S.C. § 371)(Count Seven). 24 defendants are charged in Counts One and Two, 21 defendants are charged in Count Three, 37 defendants are charged in Count Four, 35 defendants are named in Count Five, and 23 defendant are charged in Count Seven. (Second Superseding Indictment, Dkt. # 502).

II. Any Analysis of the Charges Against Maxwell Starsky Establishes that His Placement in the First Trial Group Is Erroneous and Is Unduly Prejudicial to this Defendant

As presently constituted, Trial Group No. 1, identified by the government as the "Financial Crimes Group (money laundering, identity theft and bank/wire fraud)" includes Maxwell Starsky. It also includes defendants Gevork Ter-Mkrchyan, Artin Sarkissians, Dmitry Kustov, Loui Artin, Michael Inman, Hripsime Khachtryan, Ararat Yesayan, Tigran Sarkisyan, and Ara Karapedyan. (Joint Memorandum re Trial Groupings and Trial Setting – Docket #715, p. 2:11-15.) According to the government, "the three trial groups suggested by government counsel make the most sense from an evidentiary perspective" and that "the government tried to best reflect the primary scheme in which the defendants were involved." (Docket #715, p. 3:16-17, 20-21.)

However, from the perspective of the government's pleadings, it would appear that defendant Starsky does not share anything in common with the other defendants in Trial Group No. 1 and, from an "evidentiary perspective" has much more in common with Trial Group No. 2 – identified by the government as the "Drug Diversion Group."[3] It is true that defendants Starsky, Gevork Ter-Mkrtchyan, Dmitry Kustov, Loui Artin, Michael Inman[4], Hripsime Khachtryan, Tigran Sarkisyan and Ara Karapedyan from Trial Group No. 1 are charged together as those who "negotiated and attempted to negotiate in excess of 500 fraudulent checks totaling more than $5 million and issued to a variety of payees**"** (Docket #502, p. 10, ¶20) and named along with many other defendants as part of the "Racketeering Conspiracy" (Count One [Docket #502, pp. 15-19, ¶¶29-34), the "Conspiracy to Commit Identity Theft" (Count Two [Docket #502, pp. 19-20, ¶¶35-39]), the "Conspiracy to Commit Access Device Fraud" (Count Three [Docket #502, pp. 21-23, ¶¶40-46]), the "Conspiracy to Commit Mail, Wire, and Bank Fraud" (Count Four [Docket #502, pp. 23-25, ¶¶47-51]) and the "Money Laundering Conspiracy" (Count Five [Docket #502, pp. 25-27, ¶¶52-54]). But defendant Starsky is also charged with the "Conspiracy to Engage in the Unlicensed Wholesale Distribution" (Count Seven [Docket #502, pp. 28-30, ¶¶58-61]) along with all the defendants in Trial Group No. 2.

Moreover, in support of the "negotiating fraudulent checks" contention against defendant Starsky and others, the Superseding Indictment avers: "A substantial portion of the fraudulent

[3] This group includes Mirhyan Stepanyan, Artur Stepanyan, David Miller, Yan German, Javier Ramirez, Arman Danielian, Araxia Nazaryian, Stanley Azrilyan, Arman Zargaryan, Alexander Soliman, Michael Ashegian, Marc Ashegian, Cheryl Brandt, Eric Figueroa, and Hugo Marquez. (Dkt. #715, p.2:17-20).

[4] Defendant Inman is not charged in Counts Two, Three and Five.

checks were tax refund checks sent by mail by the United States Treasury, and many of these tax refund checks had been issued based on fraudulent tax returns filed with the Internal Revenue Service" and lists 51 such tax refund checks. (Docket #502, pp. 10-12, ¶¶20-21). Yet, none of these tax refund checks relate to any conduct by defendant Starsky. Similarly, the fraudulent checks schemes averred in paragraphs 22 and 23 of the Superseding Indictment do not involve defendant Starsky at all. (Docket #502, pp. 12-13, ¶¶22-23).

Furthermore, the only specific factual averments supporting allegations against defendant Starsky in the Second Superseding Indictment for "Money Laundering" are all derivative of the allegations against him in the "Conspiracy to Engage in the Unlicensed Wholesale Distribution" (Count Seven), to wit: "ARA KARAPEDYAN and MAXWELL STARSKY, from in or about October 2014 through in or about January 2015, provided ME Wholesale with more than $1 million worth of improperly procured drugs" (Docket #502, p. 9, ¶18); and "between in or about October 2014 and in or about February 2015, ME Wholesale wired approximately $1,227,500 to another business to which KARAPEDYAN had access. KARADPEYAN caused almost all of these wire transfers to be converted into cash or to be sent as further wire transfers to other bank accounts maintained under such names as . . . 'Starsky Development Group,' . . ." (Docket #502, pp. 14, ¶27).

The averments contained in the Second Superseding Indictment in support of the "Conspiracy to Commit Identity Theft" (Count Two), the "Conspiracy to Commit Access Device Fraud" (Count Three) the "Conspiracy to Commit Mail, Wire, and Bank Fraud" (Count Four) and the "Money Laundering Conspiracy" (Count Five) are all boilerplate, are bereft of specific factual allegations and the government cannot allege any facts against defendant Starsky that do not arise out of the factual averments relating to the contention that he was involved in "more than $1 million worth of improperly procured drugs" and financial transactions related thereto in paragraphs 18 and 27 of the Second Superseding Indictment. Consequently, defendant Starsky submits that he should be included in Trial Group No. 2 rather than Trial Group No. 1 because it makes "the most sense from an evidentiary perspective" and "best reflect[s] the primary scheme in which the defendants were involved."

III. Relief from Prejudicial Joinder

The fact that defendant Starsky does not belong in Trial Group 1 from an evidentiary perspective underscores that his placement in that group, which includes the only two persons in this case charged with murder for hire, will unduly prejudice Mr. Starsky in his effort to receive a fair trial. It appears that the "murder for hire" conspiracy alleged in the Indictment is really a spurious government creation, blown far out of proportion by the prosecution. However, even if the charge had merit, those defendants should not be brought to trial with Mr. Starsky, who had absolutely nothing to do with whatever dispute gave rise to the allegations. Rule 14(a) of the Federal Rules of Criminal Procedure provides, that "if the joinder of offenses or defendants in an Indictment or Information, or a consolidation for trial appears to prejudice a defendant or the government, the Court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Defendants Karapedyan and Ter-Mkrtchyan are charged in Count Six of the Indictment with conspiracy to use interstate facility to commit murder-for-hire. Mr. Starsky has nothing whatever to do with this allegation and he should not be required to stand trial with those defendants. The danger of unfair prejudice to Mr. Starsky, who has no alleged connection with this transaction, is overwhelming and requires that that he not be placed in the same trial group as these individuals.

While there are no concrete rules as to when the danger of prejudice will require a severance, the Ninth circuit has stated that "the prime consideration in assessing the prejudicial effect of a joint trial is whether the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants, in view of its volume and the limited admissibility of some of the evidence. *United States v. Escalante*, 637 F.2d 1179, 1201 (9th Cir. 1980). Compartmentalizing the evidence "is especially difficult when . . . defendants are tried together in a complex case and they have markedly different degrees of culpability." *Zafiro v. United States*, 506 U.S. 534, 539 (1993), citing *Kotteakos v. United States*, 328 U.S. 750, 774-775 (1946). Severance is required where there is a "risk the jury may find a defendant guilty by association." *United States v. Saks*, Cr-08-0669 (CBM), 2009 WL 3416217, at * 4 (C.D.Cal. Oct. 20, 2009).

In the present case, the risk of prejudice to defendant Starsky of a joint trial outweighs any concern with judicial economy. See *United States v. Weygandt*, 2:11-cr-00249-JAM, 2013 WL 812335, at n.4 (E.D.Cal. Mar. 5, 2015). Starsky has no connection with Ter-Mkrtchyan and his relationship to Karapedyan is limited to the pharmaceutical allegations in the Indictment. The presence of these individuals at his trial will accentuate and emphasize the sensational murder for hire conspiracy allegation against them, drawing into Starsky's trial elements of violence far more sensational then the evidence of providing a false corporate "pedigree" for pharmacueticals properly applicable to him.

The government may argue that the same allegation is made in the Count One RICO charge. We are confident, however, that this charge as presently constituted simply cannot stand and that the government never will be able to prove that whatever defendants Karapedyan and Ter-Mkrtchyan did that the government claims constitutes the murder for hire conspiracy, in any way furthered the RICO conspiracy alleged in Count One. For this reason, too, Mr. Starsky should be removed from Group 1 and placed in Group 2, where he belongs by virtue of the charges and evidence against him.

IV. Rule 8 Severance

Rule 8 of the Federal Rules of Criminal Procedure deals with the matter of severance of offenses or defendants. Rule 8(b) provides in pertinent part that an indictment "may charge two or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions constituting an offense or offenses." The Indictment in this case is rife with violations of this Rule. In their motion to dismiss Count One (the RICO conspiracy count), defendants emphasized that there is little or no connection between the acts charged against the defendants. The Court Denied this motion but the fact remains that Count One constitutes a hodgepodge of criminal charges thrown together under the rubric of RICO where no connections actually exist. Thus the pharmaceutical-related violations are distinct from the check cashing, identity theft, and access device violations elsewhere alleged. Most distinct of all are the murder for hire conspiracy allegations lodged against Karapedyan and Ter-Mkrtchyan, which apparently grew out of a private dispute having nothing to do with other defendants or other charges in the Indictment.

Full explication of the Rule 8 implications of this charging fiasco will have to await further evidentiary development. However, in the present posture of the case it is possible to state with confidence that the murder for hire conspiracy allegations against these two defendants are misjoined with the charges and the evidence properly applicable to defendant Starsky. We respectfully urge the Court to grant an evidentiary hearing so that Starsky and other affected defendants may demonstrate the fallacies underlying the joinder of defendants and charges in this case.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Court should sever Mr. Starsky from the trial of defendants Karapedyan and Ter-Mkrtchyan to the extent that they remain charged with the Count Six murder-for-hire conspiracy and the corresponding allegation in Count One. The Court should thus afford Mr. Starsky relief from prejudicial joinder and should, at a minimum, issue an Order removing defendant Starsky from Trial Group 1 and placing him in Trial Group 2. We further submit that the Court should take evidence concerning the propriety of the joinder of defendants and charged offenses in this case and issue appropriate rulings based thereon.

Date: December 15, 2016

Respectfully submitted,

/s/ William L. Osterhoudt
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